Supreme Court, U.S.
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No. 97-0480

In The

Supreme Court of the United States

October Term, 1996

KEVIN T. ROOT and DALE E. ANSTINE, P.C.,

Petitioners,

v.

BOLLMAN HAT COMPANY, as Sponsor of the Bollman Hat Company Health and Welfare Benefits Plan,

Respondent.

On Petition For Writ Of Certiorari To The Third Circuit Court Of Appeals

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent requests that the Court deny the petition for writ of certiorari seeking review of an opinion of the United States Court of Appeals for the Third Circuit. The Third Circuit opinion is reported at 112 F.3d 113. This brief cites to the page numbers in the Opinion attached to Petitioner's brief at Appendix A.

REASONS FOR DENYING THE WRIT

I.

THE THIRD CIRCUIT COURT OF APPEALS' DECISION IS NOT IN CONFLICT WITH THE SEVENTH CIRCUIT'S RULING IN *BLACKBURN*

Petitioner rests his entire petition on his mistaken assertion that the Third Circuit Court of Appeals' decision below conflicts with the Seventh Circuit's decision in *Blackburn v. Sundstrand Corp.*, 115 F.3d 493 (7th Cir. 1997). However, *Blackburn* was decided on the issue of lack of subject matter jurisdiction, not subrogation or ERISA preemption. *Id.* at 494-495. Subject matter jurisdiction is not at issue in Petitioner's case. In *Blackburn*, the Seventh Circuit's only comments regarding ERISA preemption and the Illinois common-fund doctrine were in the form of *obiter dicta* as "[y]et another consideration . . . " *Id.* at 495. Because the Seventh Circuit had already decided the district court lacked the prerequisite subject matter jurisdiction, the opinion regarding the state common-fund doctrine was unnecessary and not binding. *Seminole Tribe v. Florida*, 116 S. Ct. 1114, 1129 (1996).

Obviously, an alleged conflict with *dicta* from a Seventh Circuit Court of Appeals' opinion regarding Illinois' common-fund doctrine does not create a conflict between the circuits warranting Supreme Court review.

II.

THE SEVENTH CIRCUIT'S *DICTA* IN *BLACKBURN* DOES NOT CONFLICT WITH *BOLLMAN HAT.*

Even assuming *arguendo* that the Seventh Circuit's comments regarding ERISA preemption were not *dicta,* the petitioner still has failed to cite a conflict because *Blackburn* expressly allows for the result reached in *Bollman Hat.* Although the Seventh Circuit ruled that the common-fund doctrine was not preempted by ERISA under the facts presented in *Blackburn,*[1] the Court noted that an ERISA plan with appropriate terms could avoid the Illinois common-fund doctrine:

> A plan might have a better argument if its governing documents expressly required participants to pay their own legal fees (alternatively, to hire only attorneys who agree to waive the common-fund doctrine) and to remit the gross rather than the net proceeds from litigation. ERISA permits a medical plan to pay a fraction of the costs, requiring a copayment from the beneficiary. . . . A plan that nominally pays 100

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[1] The terms of the benefits plan in *Blackburn* were not discussed in the opinion, but the court made clear that the plan did not expressly address, one way or another, whether the plan would be entitled to recoup 100 percent of its funds from any recovery or whether it would have to pay a share of attorneys' fees and costs.

> percent of medical costs incurred following accidents, and then requires participants to hire counsel, initiate litigation, and remit any recovery (bearing costs of counsel themselves), has effectively agreed to insure only part of the real cost of care, although it advances the full cost while the participant tries to find other sources of payment. . . . A state's refusal to respect such a provision might be deemed equivalent to a direction that the plan pay all, rather than part, of the medical costs of accidents. But Sundstrand's plan does not have such a requirement, Illinois has not attempted to override it, and there will be time to cross that bridge when we come to it.

Id. at 496. By this language the Seventh Circuit left open the possibility that the common-fund doctrine would not apply due to the express provisions of an ERISA plan. The Bollman Hat ERISA plan, unlike the one in *Blackburn*, contained such express provisions. Bollman Hat's plan included "unambiguous terms" requiring reimbursement of "any payments" and "all" funds recovered from third parties, without reduction for attorney's fees and costs. Petition at 2; Opinion at App. 8. It thereby created the type of "requirement" outlined in *Blackburn* that would trump the state's common-fund doctrine and allow the plan to receive full reimbursement, without a deduction for attorney's fees and costs. As such, the opinion in *Bollman Hat* harmonizes perfectly with *Blackburn*, and no conflict exists to justify Supreme Court review.

III.

THE THIRD CIRCUIT'S DECISION CONFORMS WITH SUPREME COURT PRECEDENT REGARDING ERISA PREEMPTION, INCLUDING *FMC CORP. V. HOLLIDAY,* AND A REVERSAL WOULD CREATE INCONSISTENT AND UNPREDICTABLE STANDARDS.

This Court, following the mandate of ERISA, 29 U.S.C. § 1144(a), has established a consistent and well-reasoned body of law regarding preemption of state law "relating to" an ERISA plan. *See, e.g., FMC Corp. v. Holliday,* 498 U.S. 52 (1990); *Metropolitan Life Ins. Co. v. Massachusetts,* 471 U.S. 724 (1985); *Pilot Life Ins. Co. v. Dedeaux,* 481 U.S. 41 (1987). More particularly, this Court has ruled that ERISA preempts state laws regarding subrogation comparable to the one challenged here. *FMC Corp., supra.* Petitioner presents no distinction or reason to justify variance from these precedents or Congress' mandate of preemption. To allow a special exception for Pennsylvania's common-fund doctrine would lead to a bewildering array of state-law exceptions to ERISA preemption, which would defeat Congress' purpose of creating a uniform federal law for such plans. *Pilot Life Ins.,* 481 U.S. at 46.

Because there is no compelling reason to vary from the established law or the terms of the plan, the petition for review should be denied.

CONCLUSION

For the reasons set forth above, the writ of certiorari should be denied.

Respectfully submitted

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